2013 SENATE GOVERNMENT AND VETERANS AFFAIRS

SB 2213

2013 SENATE STANDING COMMITTEE MINUTES

Senate Government and Veterans Affairs Committee
Missouri River Room, State Capitol

SB 2213
02/01/2013
Job Number 18137

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

A BILL for an Act relating to the restricted area around polling places for certain activities.

Minutes:

Chairman Dever: Opened hearing on SB 2213.

Senator Miller, District 10: See Attachment #1 for testimony as sponsor and in support. See Attachment #2 for additional information.

(1:42) Chairman Dever: Do I see correctly that this would still exclude electioneering within100 feet of the polling place?

Senator Miller: That is exactly what it will do. You cannot go to the polling site and hold up your signs while a person is trying cast their ballot. It gives a little of an exemption for a sticker on your car.

Chairman Dever: (Commented on a personal experience)

Senator Nelson: You have also added some wording that states "while it is open". Does this imply that anytime we have early voting?

Senator Miller: Yes, I would assume that is what is intended. This language came from the Secretary of State and the Attorney General's office.

Senator Nelson: Does this mean if I early vote, I cannot wear a campaign button?

Senator Miller: I believe while you are on that polling site, it probably would not be something you are wearing. An early voting site will be treated the same as you were voting on Election Day.

Senator Nelson: At least one of our polling places was in a hotel. You have people going in and out of the hotel all the time and they may inadvertently get close to 100 feet from the actual room in which the polling is being done.

Senator Miller: I am not sure about that. You will have to discuss that. Obviously if you are in a hotel and walking by, I don't think that is really the problem. I think the signs and purposely trying to intimidate voters is what you want to avoid.

Chairman Dever: It does raise an interesting question sometimes when there might be a political rally in a different part of the same building. Or in the case of the hotel and they have an electronic bill board out front.

Senator Miller: One thing you have to remember is that local counties regulate these things and they decide where the polling places will be and they can use discretion as to where they will put these things.

Chairman Dever: We have always known this law is unconstitutional. No one has ever wanted to be the one to test it. I think we are fortunate to live in a state where elected officials and candidates have respect for the people.

Senator Miller: I did not speak to the constitutionality of the bill and the need for it. I think it is pretty clear when read the court's opinion. As a candidate I have a huge disdain for having to run around tearing down signs the day before election when I should have been talking to voters. That is a waste of my time.

Chairman Dever: I think you could construe the bill to broaden existing law in campaigning or you could construe it to provide restrictions or guidelines as to what can be done.

Senator Miller: I agree with that assessment, and when you look at what other states do, I think the courts may have somehow set a certain precedent as to what is acceptable. People should be free to vote uninhibited.

(8:42) Wayne Stenehjem, Attorney General: Testified in support of the bill. It implicates a number of constitutional and rule of court considerations and has a rather interesting history. It implicates the First Amendment which involves all of our duties as elected officials who take an oath of office to support and defend the Constitution of the United States and of the state of North Dakota. It implicates my duty as a constitutional officer to attempt to the best of ability to defend enactments of the legislature and implicates the rules of court, which provide that attorneys are not to appear in court with frivolous claims or defenses. This issue came to the forefront publically in the last election. When Gary Emineth sought a court order declaring this section of the law unconstitutional, it was my duty then to find someone on my staff that was willing to defend this enactment. Fortunately I was able to find someone to do the best that he could. The history of the issue revealed that I tried twice to repeal this statute for the reasons that court articulated when it issued its preliminary injunction just before the last election. The Senate passed the measure to repeal the legislation, but the House did not. That left us with the case that brought and we brought forth what legislative history we could find together with what information we could produce and the court had its hearing and issued its preliminary injunction determining that this statute is unconstitutional. (Reads from ruling passed out - attachment #2) The federal district court in the preliminary injunction found this statute unconstitutional. I do not think that any further hearing or any appeal will be successful. The chances are remote. You should be aware that courts have held that while general bans on electioneering of any kind on Election Day are unconstitutional, they do permit

regulation of activities in and around the polls. One hundred feet seems to be fairly common. That is why this proposed legislation mentions the hundred feet. If you don't enact this and we go to court and the court continues with its apparent belief that this statute is unconstitutional, two things will happen. We won't have any restrictions whatsoever on where you can campaign but we will not have in the law a restriction on campaigning within that hundred foot zone because everything will be gone. The other thing that happens is because this is a lawsuit brought under US code section 1983, a violation of an individual's civil rights, if we lose, we will be required to pay the attorney's fees for the party that wins. So far we are on the hook for attorney's fees thus far and we will be further on the hook for even more if we lose as I am suggesting will happen. Those fees can be substantial. I did visit with the attorneys for the plaintiff and did ask them to understand that my duty is to go in and defend the statue, please don't impose a rule 11 sanction against us for claiming that we are presenting a frivolous defense. He agreed not to do that. We also said that rather than proceed further and incur additional fees, we asked them to permit us to come before the legislature and ask you to consider repealing the statute. That is why I am here and make it clear that this is necessary. It is my hope that the legislature will pass this bill and that bit of North Dakota law will disappear.

(15:10) Senator Nelson: Since you opened the door, what is your definition of substantial fees, what are they?

Wayne Stenehjem: It is hard to know. Fees of $400 to $500 per hour are not unusual and I would not be surprised if the bill that the bill that the state of North Dakota gets so far is in the realm of $15,000 to $20,000. If we go further it will be far more than that. There is no way of knowing. A lot of us who have run for office do rather enjoy the taking down of the signs and celebrating the night before, but it is not a good enough reason to violate

someone's right to speak freely. I know that the states attorney's get complaints from time to time about whose sign were left out. Whether it was inadvertent or not, state's attorneys are typically not prosecuting these because they are well aware of the likelihood of no success. It is time that the statutes of North Dakota reflect the legal reality.

Chairman Dever: I see there was a penalty in here as an infraction here, and it was taken out.

Wayne Stenehjem: There is a catch all definition and a penalty provision that says that it is a misdemeanor offense in that chapter. So any violation of this chapter is a Class A misdemeanor. What are left now are restrictions on electioneering within one hundred feet of a polling place. That does include not just Election Day, but all of those days but all the early voting.

Chairman Dever: Whether the building is a public building or not?

Wayne Stenehjem: One hundred feet of wherever the polling place. If buttons are on, they ask them to take them off.

Vice Chairman Berry: This would cover is someone is just standing in a hall with some buttons?

Wayne Stenehjem: They just ask them to take them off.

Senator Nelson: This does not impact presidential primary elections.

Chairman Dever: Primary general is special elections.

(19:57) Jim Sulum: See Attachment #3 for support and testimony.

(22:06) Vice Chairman Berry: Would you want an amendment to include vehicles?

Jim Sulum: I cannot speak to the constitutionality of that sort of action. I think you understand what we are trying to get out of the bill. Whatever would be appropriate would be welcome by this office.

Vice Chairman Berry: I understand what is being attempted, but I also know that many individuals look at ways to subvert the rules. If you choose to have a vehicle so marked, I can see individuals trying to take advantage of that.

Chairman Dever: I was wondering about the definition of a polling place on whether it included a parking lot, and I see that it says one hundred feet from the entrance to the room containing a polling place.

Jim Sulum: (Give an example)

Chairman Dever: (Talked about the Civic Center)

Jim Sulum: That is true, but if in a fire hall or senior center you might have a parking lot closer to the polling and it might cause a problem. From our research, most states have a setback area and 19 currently have 100 feet as the setback. Some range up to 600 feet and some are down to 10 feet. Within a polling place it is very easy for the election board to manage that environment. Outside the polling place, that would need to be handled by another authority; Presumably law enforcement.

Chairman Dever: Sure.

Wayne Stenehjem: What we really are attempting to do with the 100 foot setback is make sure that people are not accosted by campaigners who are coming and going.

Vice Chairman Berry: I was not saying it necessarily in a negative sense; some people think they are doing you a big favor. The reality is that you may not want that.

Wayne Stenehjem: One hundred feet isn't that far.

Vice Chairman Berry: Minnesota has something similar to this.

Wayne Stenehjem: The reason for 100 feet is because it has been upheld and the most common that states have.

Chairman Dever: One of the advantages of the previous circumstance is that we got all that stuff cleaned up all at once.

Wayne Stenehjem: That is true. Courts have not looked kindly on that as an argument in favor of it any more than they did of the litter argument for windshield brochures.

Vice Chairman Berry: Would there be anything in this that they have to pick the signs up?

Wayne Stenehjem: We have littering statutes. I don't know that others can say when you have to take the signs down.

Senator Nelson: What about the violation of church and state, what if they are on church property?

Wayne Stenehjem: Churches are private property and they can put up whatever signs they want.

Jim Sulum: I just have to say for the record that I am looking forward to Election Day and not getting the well over several hundred phone calls on the signs that are not down.

Chairman Dever: Closed the hearing on SB 2213.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Government and Veterans Affairs Committee
Missouri River Room, State Capitol

SB 2213
02/01/2013
Job Number 18160

☐ Conference Committee

Committee Clerk Signature

Minutes:

Chairman Dever: Opened SB 2213 for committee discussion.

Senator Schaible: Moved a Do Pass.

Senator Nelson: Seconded.

A Roll Call Vote Was Taken: 6 yeas, 0 nays, 1 absent.

Senator Schaible: Carrier.

Date: 2/1

Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. 2213

Senate Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Schaible Seconded By Senator Nelson

Senators	Yes	No	Senator	Yes	No
Chariman Dick Dever	✓		Senator Carolyn Nelson	✓	
Vice Chairman Spencer Berry	✓		Senator Richard Marcellais	—	
Senator Dwight Cook	✓				
Senator Donald Schaible	✓				
Senator Nicole Poolman	✓				

Total (Yes) 6 No 0

Absent 1

Floor Assignment Senator Schaible

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2213: Government and Veterans Affairs Committee (Sen. Dever, Chairman) recommends **DO PASS** (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2213 was placed on the Eleventh order on the calendar.

2013 HOUSE GOVERNMENT AND VETERANS AFFAIRS

SB 2213

2013 HOUSE STANDING COMMITTEE MINUTES

House Government and Veterans Affairs Committee
Fort Union Room, State Capitol

SB 2213
March 14, 2013
19962

☐ Conference Committee

Committee Clerk Signature Carmen Hart

Explanation or reason for introduction of bill/resolution:

Relating to the restricted area around polling places for certain activities.

Minutes: You may make reference to "attached testimony."

Chairman Jim Kasper opened the hearing on SB 2213.

Wayne Stenehjem, Attorney General, appeared in support. Since at least 1911 North Dakota has a statue on the books that says that any person soliciting or in any manner trying to induce or persuade any voter on an election day to vote or refrain from voting for any candidate or the candidates or ticket of a political party or organization or any measure submitted to the people is guilty of an infraction. Last fall an individual sued the state of North Dakota seeking to overturn this ancient law on first amendment grounds. We went to court on the motion for a preliminary injunction. The state of North Dakota lost and lost an opinion that the court issued which I think was rather specific and clear. The court noted that any prior restraint on first amendment activities require that the statue be viewed with what is called strict scrutiny. **Attachment 1.** (1:29-3:27) I don't see our prospects as being all that good after I read what he had to say here. We visited with council for the plaintiff in that case and suggested to them that rather than proceeding further that the proper thing to do would be to bring this before you to look at the prospect of changing the law. The federal court has found already that it is unconstitutional. We believe that an appeal will probably not be very successful if we are required to do that. If the law is struck down, then we will not have the one thing that courts said we could have in controlling speech on election day and that is controlling actions or campaigning in or around the polls. The other fear that I have is that as we proceed, if we lose, we are required to pay attorney fees for the prevailing side. The one thing that it does is to permit prohibition on campaigning in and around a polling place. The number of feet that was suggested in this bill is 100. 100 feet was the most common. 19 states say 100 feet. Two say 10, one says 25, one says 30, one says 40, four say 50, and go up to one state saying 600.

Chairman Jim Kasper asked for a copy of the supreme court ruling which was provided as Attachment 1. Did it address freedom of speech from the perspective of political signage, signage located in residential areas and whether or not political subdivisions could enact ordinances prohibiting freedom of speech with political signs?

Attorney General Stenehjem The case I am referring to is from the US district court for the district of ND.

Chairman Jim Kasper Would it be your opinion that cities or counties could not pass ordinances other than for public safety that would restrict political signs during an election campaign?

Attorney General Stenehjem Things that have been upheld are things of the nature you are talking about.

Chairman Jim Kasper Do we know what size is too big?

Attorney General Stenehjem I don't know off the top of my head.

Vice Chair Randy Boehning took over the hearing because Chairman Kasper had to leave for a meeting.

Rep. Ben Koppelman I know of some precincts that are in or near my district that may rent church or facility and they are tucked right in a residential area. If the building entrance is only 50 feet from my yard, is there anything that would suggest that they could restrict my right to display my beliefs on my property? Could we amend this to say only on the property? You know what I am saying?

Attorney General Stenehjem I think I do but it might get needlessly complex I fear.

Rep. Ben Koppelman From your prospective as attorney general even if it was within 100 feet of their own front yard, do you think they could be prosecuted for that successfully?

Attorney General Stenehjem We get more calls about this on election day because of forgetting to take down yard signs, etc. Law enforcement comes and says you have to take the signs down. They don't want to prosecute anybody. This bill was the most sensible way to deal with it. If individual problems come up down the road, we will have to look at whether an amendment might be necessary or not.

Vice Chair Randy Boehning In Section 1they have to be within 100 feet of the outermost door. In Section 2 it is within 100 of the entrance to the polling place. If you go inside a building, is it 100 feet from that where you can't have your signage? In reality, it could be 50 feet?

Attorney General Stenehjem There is a fixed point from which the radius will be 100 feet.

Vice Chair Randy Boehning If you are inside the hotel, for instance, where you are voting in the conference room within inside the hotel, it would be 100 feet from that entrance to that? In Section 1, they have to be within 100 feet of the outermost entrance to the building?

Attorney General Stenehjem Why we have Section 1 I am not sure? It is kind of a Kings X area for you. I am guessing tThat statue has been there since statehood.

Vice Chair Randy Boehning The chairman had a question. If you can find out the federal statue which you referred to, give that to our committee.

Attorney General Stenehjem You want to know what Section 18 US Code 1983 is?

Vice Chair Randy Boehning Yes.

Senator Joe Miller appeared in support. I did email all of the committee members the court decision ruling. On the senate side it went around and around saying does it mean this or does it mean this? Just focus clearly on the language of the bill. If you are casting your ballot in the Allerus Center in Grand Forks, you can have a political rally on the other end of the building and that is perfectly fine so as long as you are 100 feet away from the door of the room where they are voting.

Jim Silrum, Deputy Secretary of State, appeared in support. **Attachment 2.** You are right, Rep. Boehning. The section of law dealing with the setback for the service of civil process has been dealt with since you have been here, but it has been itself in state law for a long time. We chose to say the outermost entrance for that because we wanted to give voters more grace on being served than for the political type rallies that might be going on in the Allerus Center or that sort of thing.

The hearing was closed.

2013 HOUSE STANDING COMMITTEE MINUTES

House Government and Veterans Affairs Committee
Fort Union Room, State Capitol

SB 2213
March 15, 2013
20017

☐ Conference Committee

Committee Clerk Signature Carmen Hart

Explanation or reason for introduction of bill/resolution:

Relating to the restricted area around polling places for certain activities.

Minutes: You may make reference to "attached testimony."

Chairman Jim Kasper opened the session by reviewing that this bill has to do with free speech and supreme court rulings. Attorney General Stenehjem gave testimony whereby we would be able to restrict certain political speech within 100 feet of polling places and that is what the bill does.

Rep. Ben Koppelman I would like to hold this bill over for a possible amendment.

Chairman Jim Kasper We will hold it, but have your amendments on Thursday.

2013 HOUSE STANDING COMMITTEE MINUTES

House Government and Veterans Affairs Committee
Fort Union Room, State Capitol

SB 2213
March 29, 2013
20692

☐ Conference Committee

Committee Clerk Signature Carmen Hart

Explanation or reason for introduction of bill/resolution:

Relating to the restricted area around polling places for certain activities.

Minutes: Attachment 1

Chairman Jim Kasper opened the session on SB 2213.

Rep. Ben Koppelman presented the amendment. **Attachment 1.** This was the bill in reaction to the Gary Emineth versus essentially the state of North Dakota. When they were here I was concerned about a few clerical items and how our new rules in this proposed bill would affect private property. For example, something adjacent to the polling place or where this could have more far reaching effects than what the intent was. I reviewed the court case. He went through the amendment line by line. (2:37-6:20) The basis for this language came out of this court case. He read some. (6:27-7:15)

Chairman Jim Kasper Billboards would be commercial speech, wouldn't it?

Rep. Ben Koppelman Billboards but geared toward an enterprise, a money making operation. (7:29-8:15) The goal of this amendment was to honor the intent of those who wrote the bill for in and around the polling place to not have people be bombarded with peddlers or other sorts of campaigning. Then once it is outside to honor what the court had said about North Dakota's law that was not struck down but sort of made invalid by the electioneering rules that we use to have that were very strict. I move the amendment.

Rep. Vicky Steiner seconded.

Rep. Vernon Laning I assume the public safety would include things like a huge sign that blocks your vision from oncoming traffic?

Rep. Ben Koppelman That is true.

Rep. Gail Mooney In Hillsboro we have a county courthouse and that is where the bulk of our voting takes place. Directly across the street, there are residents on either side, so those residents are allowed to leave their signage or they now need to remove the signage?

Rep. Ben Koppelman They would be allowed to leave it. When I asked questions of the original people, I think the intent was that they would be able to leave it, because the court case very strictly says they can do it in and around the entrance of the polling place. The insinuation is that, like on the courthouse property, if they are voting just inside the courthouse door, they would have a 100 foot limitation from the door. If it is government owned, they can just rule that you can't have it on the public property, because this only deals with private. I was more concerned about a privately owned polling place where it got really gray like a church.

Rep. Karen Karls Does this mean that our city could no longer say lawn signs can only go up 45 days before the election and have to come down on election day or somewhere in that neighborhood?

Rep. Ben Koppelman The way this bill is written both in its previous form and in its amended form are silent on that issue in terms of time. If you read into a lot of the court cases, there are a lot of challenges as to whether or not you can put up a definite limitation to free speech.

Chairman Jim Kasper As I drive back and forth to Fargo, I see a barn out in the field along the highway that has political signage on it year round and it is on his private property. The question is should anyone be able to say you can't have that sign up there, and the court says no one can prohibit you from having that sign.

Rep. Ben Koppelman An example in a city would be a pray to end abortion sign. They are there all the time. The courts have argued that you can't hinder my ability to put that up. That is a little different in some people's mind than candidates, but in the court's mind, it is not, because it is political free speech.

Rep. Karen Karls There is a lady on the way to Minot that has an old wagon set up that says flea market, and she has gotten in all kinds of trouble over the years because her sign was too close to a federal highway. Are her free speech rights being violated?

Rep. Ben Koppelman That would be the second one I was quoting. In the second amendment the courts have commonly said that an individual's free speech of political or religious or other noncommercial, non-enterprising speech is very protected.

Chairman Jim Kasper If this were on a federal highway, the federal government may have a rule that has a setback that says you can have the sign, but it has to be so many feet away from our right of way.

Rep. Ben Koppelman That would probably be true, but if they tried to enforce that on political speech, the courts might strike them down.

Rep. Karen Karls It is election day. The next day those signs are useless, but under this law, we could have them all year and those lawn signs get to looking pretty tacky. Don't cities have the right to put some kind of restriction or tell people you have to have them down the day after the election?

Chairman Jim Kasper I think the Emineth case said no. The Emineth case said that is free speech.

Rep. Ben Koppelman In my research there has been some court discussion about if the sign is degraded to the point where it is breaking apart and tearing off, there is a way for them to enforce antilittering type of rules, so they can say that the sign has to be in a condition that is durable.

Rep. Jason Dockter DOT collected all of our signs because we were in the right of way by Highway 83, and we had to go and pick them up.

Rep. Ben Koppelman It is the same thing in Fargo. What the courts have said is on public property any government entity can have an absolute ban or restrictions or whatever they want. If it is in a road right of way or boulevard, that is absolutely legitimate here.

Rep. Steven Zaiser A lot of these problems people are talking about are simply setback requirements for structures.

A voice vote was taken to adopt the amendment. Motion carries.

Rep. Karen Rohr made a motion for a Do pass as amended.

Rep. Gail Mooney seconded.

A roll call vote was taken and resulted in **DO PASS AS AMENDED, 13-1. Rep. Ben Koppelman** said he would be the carrier instead of Rep. Rohr.

Prepared by the Legislative Council staff for
Representative B. Koppelman
March 19, 2013

3/19/13

PROPOSED AMENDMENTS TO SENATE BILL NO. 2213

Page 1, line 17, replace "No" with:

"1. An"

Page 1, line 17, replace "shall" with "may not"

Page 2, line 2, replace "However, vehicles and movable signs" with:

"2. A vehicle or movable sign"

Page 2, line 2, remove "political"

Page 2, line 3, replace "messages" with "a political message"

Page 2, line 3, replace "by this section shall only" with "in subsection 1 may"

Page 2, line 3, after "area" insert "only"

Page 2, after line 5, insert:

"3. Except as provided in subsection 1, a sign placed on private property which displays a political message may not be restricted by a political subdivision, including a home rule city or county, unless the political subdivision demonstrates a burden to the public safety."

Renumber accordingly

Date: 3-29-13
Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2213

House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 13.8228.01003

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☑ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Koppelman Seconded By Steiner

Representatives	Yes	No	Representatives	Yes	No
Chairman Jim Kasper			Rep. Bill Amerman		
Vice Chairman Randy Boehning			Rep. Gail Mooney		
Rep. Jason Dockter			Rep. Marie Strinden		
Rep. Karen Karls			Rep. Steven Zaiser		
Rep. Ben Koppelman					
Rep. Vernon Laning					
Rep. Scott Louser					
Rep. Gary Paur					
Rep. Karen Rohr					
Rep. Vicky Steiner					

Voice Vote
Motion Carries

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 3-29-13
Roll Call Vote #: 2

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2213

House Government and Veterans Affairs Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rohr Seconded By Mooney

Representatives	Yes	No	Representatives	Yes	No
Chairman Jim Kasper	X		Rep. Bill Amerman	X	
Vice Chairman Randy Boehning	X		Rep. Gail Mooney	X	
Rep. Jason Dockter	X		Rep. Marie Strinden	X	
Rep. Karen Karls		X	Rep. Steven Zaiser	X	
Rep. Ben Koppelman	X				
Rep. Vernon Laning	X				
Rep. Scott Louser	X				
Rep. Gary Paur	X				
Rep. Karen Rohr	X				
Rep. Vicky Steiner	X				

Total (Yes) 13 No 1

Absent 0

Floor Assignment Rep. Koppelman

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2213: Government and Veterans Affairs Committee (Rep. Kasper, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). SB 2213 was placed on the Sixth order on the calendar.

Page 1, line 17, replace "No" with:

"1. An"

Page 1, line 17, replace "shall" with "may not"

Page 2, line 2, replace "However, vehicles and movable signs" with:

"2. A vehicle or movable sign"

Page 2, line 2, remove "political"

Page 2, line 3, replace "messages" with "a political message"

Page 2, line 3, replace "by this section shall only" with "in subsection 1 may"

Page 2, line 3, after "area" insert "only"

Page 2, after line 5, insert:

"3. Except as provided in subsection 1, a sign placed on private property which displays a political message may not be restricted by a political subdivision, including a home rule city or county, unless the political subdivision demonstrates a burden to the public safety."

Renumber accordingly

2013 CONFERENCE COMMITTEE

SB 2213

2013 SENATE STANDING COMMITTEE MINUTES

Senate Government and Veterans Affairs Committee
Missouri River Room, State Capitol

SB 2213
04/16/2013
Job Number 21154

☒ Conference Committee

Committee Clerk Signature

Minutes:

Chairman Schaible: Opened the conference committee on SB 2213.

Representative Ben Koppelman: Explained the changes that the House had made to the bill and read from the court's decision on the lawsuit that spurred this bill before the committee. (A copy of the court decision was in prior minutes of the bill.)

(5:20)Senator Nelson: Asked a question regarding covenants.

Representative Koppelman: A development is not a political subdivision. The covenants are also not ordinances. They are contracts. Unless otherwise prohibited by state law, you can contract and agree to not do this; which is different than a city or a county taking a blanket approach that says that no one shall - regardless of if they are willing to agree or not. There is a difference there. I did speak with the Attorney General about that and he said that his interpretation of this would indicate that it is more permissible to have restrictions in covenant instead of having restrictions by law/ordinance that a city does. When a city does a blanket approach like that, he said that he does not believe that it is in standing with what the court would say was allowed. Covenants, unless otherwise prohibited by law, would be allowed because it is contract law. In talking with Senator Dever, he has indicated that he believes there is a portion of law that specifically says you can't limit that by covenant so then that may not be allowed because of that law but not because of what we are talking about today. That is a different section of the law.

Representative Kasper: The long and the short of it is that it appears that you may do a covenant with a subdivision but this bill does not address that. This deals with the political entities.

Senator Nelson: So if they want a clutter free subdivision they can?

Representative Kasper: It appears so.

Senator Nelson: There is an electronic sign that has caused all sorts of problems in Fargo, would that be referred to as (inaudible)?

Representative Kasper: That would probably be where the issue would have to be debated. When it comes to a public safety issue and it impedes a line of sight of traffic or of pedestrians then it could be debated.

Senator Nelson: How about underground lines?

Representative Kasper: There would be a safety issue as well. That is also a commercial sign and not a political sign. It is a different situation. I applaud Representative Koppelman and his effort to come up with an amendment that satisfies what the court case says. Our committee was very comfortable in that and passed the bill 13-1 and the floor passed it 89-3 or something like that. It is a good piece of legislation and I hope the Senate agrees.

Senator Dever: I would like to mention that I had a conversation with the Attorney General and he feels that this language strengthens it. I had previously thought that the restrictions that the city of Bismarck has, which includes limiting the size of signs in the yards, were reasonable he said who defines what is reasonable. I thought that I should not be the only person on our side that had that kind of conversation, so I felt this should go to conference committee and broaden our conversion.

Senator Nelson: My question is that a sign can be placed, is that the crux of the court decision or can the city has restrictions on the size?

Representative Koppelman: There is a section of the court decision that addresses compelling government interest as well as other research that I did, there were additional court cases that the Supreme Court talked about public safety specifically and so the two appear to be very closely knit. Laws must be narrowly tailored to serve a compelling government interest. Is size a compelling government interest? I do not know. The Attorney General would suggest that someone would have to interpret that. In regards to boulevards and public places, the government has full reign of saying none at all or how it will be limited. I am referring to private property.

Senator Nelson: I think Fargo has a restriction on size and they also have a restriction on the length of time that they can be at certain places, is that addressed or is that something that would have to be rescinded?

Representative Kasper: I think that would be a debatable situation. The bill says that they may not be restricted by a political subdivision. In light of what the safety and the public interest is, so if there is a case made about safety and public interest, I think they would have the ability to do that. There are two or three places along the interstate where there are huge permanent signs out in fields and the question would be if a government entity has a compelling interest to restrict that sign out there? The answer is no. I think the argument would have to be made by the government entity that they have a compelling interest to restrict signs inside of their area that they have the ordinance power. If the cities say do and someone else says they don't, then that is what the courts would decide. The intent is to protect free speech under the United States Constitution.

Senator Dever: In one of our campaigns they did not like our 4x8 signs and it was insisted by the city inspector that a plan was drafted and signed by an architect - that was ridiculous as well but I think the point of that is that there are signs that do require a plan signed by an

architect including billboards. You would not be able to put up something like that because it would be a matter of public safety as well. I think the city does have an ability to make those restrictions.

Representative Kasper: I think again with the research that Representative Koppelman has done in the court case that ruled just recently; the key to what the cities and counties can and cannot do is if there is a compelling interest and is there a safety issue and I think this clarifies that. Our Attorney General feels it strengthens the bill and had no objection at all to the bill based on the court case and what he felt was proper statute.

Senator Dever: Moved that the Senate Accede to the House Amendments.

Representative Kasper: Seconded.

A Roll Call Vote Was Taken: 6 yeas, 0 nays, 0 absent.

Senator Schaible and Representative Koppelman carriers.

Date 4/16

Roll Call Vote # 1

2013 SENATE CONFERENCE COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. 2213 as (re) engrossed

Senate GVA **Committee**

Action Taken

- [x] SENATE accede to House Amendments
- [ ] SENATE accede to House Amendments and further amend
- [ ] HOUSE recede from House amendments
- [ ] HOUSE recede from House amendments and amend as follows
- [ ] **Unable to agree**, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Senator Dever Seconded by: Rep. Kaspel

Senators	4/16			Yes	No	Representatives	4/16			Yes	No
Senator Schaible	✓			✓		Rep. Kasper	✓			✓	
Senator Dever	✓			✓		Rep. Koppelman	✓			✓	
Senator Nelson	✓			✓		Rep. Amerman	✓			✓	
Total Senate Vote						Total Rep. Vote					

Vote Count Yes: 6 No: 0 Absent: 0

Senate Carrier Senator Schaible House Carrier Rep. Koppelman

LC Number _____ . _____ of amendment

LC Number _____ . _____ of engrossment

REPORT OF CONFERENCE COMMITTEE

SB 2213: Your conference committee (Sens. Schaible, Dever, Nelson and Reps. Kasper, B. Koppelman, Amerman) recommends that the **SENATE ACCEDE** to the House amendments as printed on SJ page 1065 and place SB 2213 on the Seventh order.

SB 2213 was placed on the Seventh order of business on the calendar.

2013 TESTIMONY

SB 2213

#1

Testimony on SB 2213

Senator Joe Miller

Before the Senate Government and Veterans Affairs Committee,
Senator Dever Chairman

Mr. Chairman and Senators, SB 2213 will remove the prohibition of electioneering on Election Day from the code.

An injunction was granted against the law this last election season for the basis that it violates the 1st Amendment. This bill is to address that injunction by repealing the law and putting in place set back of 100 feet from polling locations to ensure that voters can vote with privacy and without intimidation.

Thank you,

Joe Miller

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Gary Emineth, Plaintiff, vs. Alvin Jaeger, Secretary of State of North Dakota, in his official capacity; Wayne Stenehjem, Attorney General of North Dakota, in his official capacity; Richard J. Riha, Burleigh County State's Attorney, in his official capacity, Defendants.	)	**ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION** Case No. 1:12-cv-139

Before the Court is a "Motion for Preliminary Injunction" filed by the Plaintiff on October 25, 2012. See Docket No. 12. The defendants filed responsive briefs on October 29, 2012. See Docket Nos. 13-14. The parties have agreed there is no need for a hearing on the motion and the matter may be decided on the briefs. For the reasons set forth below, the motion is **GRANTED**.

I. BACKGROUND

The plaintiff, Gary Emineth, is a resident of Lincoln, North Dakota. Emineth challenges the constitutionality of Section 16.1-10-06 of the North Dakota Century Code, which provides as follows:

> **16.1-10-06. Electioneering on Election Day - Penalty.**
> Any person asking, soliciting, or in any manner trying to induce or persuade, any voter on an election day to vote or refrain from voting for any candidate or the candidates or ticket of any political party or organization, or any measure submitted to the people, is guilty of an infraction. The display upon motor vehicles of adhesive signs which are not readily removable and which promote the candidacy of any individual, any political party, or a vote upon any measure, and political

> advertisements promoting the candidacy of any individual, political party, or a vote upon any measure which are displayed on fixed permanent billboards, may not, however, be deemed a violation of this section.

Emineth seeks to exercise his First Amendment right to engage in political activity on November 6, 2012 – Election Day. He contends the North Dakota statute is an unconstitutional abridgment of his First Amendment right to free speech as incorporated against the states by the Fourteenth Amendment. Emineth is currently engaged in constitutionally-protected speech through a display of election yard signs on his private property, and he does not wish to take those signs down on November 6, 2012, as required by North Dakota law. Emineth states that he wishes to speak in support of candidates on Election Day by distributing flyers in public places, which state law prohibits. Emineth states that he frequently discusses the upcoming election with friends, family members, associates, and neighbors, and seeks to continue to do so on Election Day, but state law prohibits such actions. Emineth contends the plain language of Section 16.1-10-06 criminalizes *all speech* aimed at persuading a voter to cast (or not cast) his or her ballot in any particular way on Election Day. He argues that outlawing this conduct before it even takes place imposes a prior restraint on constitutionally-protected speech. Under North Dakota law, if a private individual advocates for or against a candidate, a ballot measure, or any party on an election day – whether to a family member, neighbor, friend, associate, or any other voter – that individual is subject to criminal prosecution. There are few exceptions to criminal prosecution, other than the limited exception for billboards and bumper stickers with particular adhesion qualities. See N.D.C.C. § 16.1-10-06.

II. LEGAL DISCUSSION

In determining whether a preliminary injunction should be granted, Rule 65(b) of the Federal Rules of Civil Procedure directs the court to assess whether immediate and irreparable injury, loss, or damage will result to the applicant. The court is required to consider the factors set forth in Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981). Whether a preliminary injunction or temporary restraining order should be granted involves consideration of "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." Id.

It is well-established that the burden of establishing the necessity of a temporary restraining order or a preliminary injunction is on the movant. Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994); Modern Computer Sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734, 737 (8th Cir. 1989). "'No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction.'" Baker Elec. Coop., Inc., 28 F.3d at 1472 (quoting Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc., 815 F.2d 500, 503 (8th Cir. 1987)).

A. IRREPARABLE HARM

The plaintiff must show there is a threat of irreparable harm if injunctive relief is not granted, and that such harm is not compensable by money damages. Doe v. LaDue, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007) (citing Northland Ins. Cos. v. Blaylock, 115 F. Supp. 2d 1108, 1116 (D. Minn. 2000)). "The 'mere possibility' that harm may occur before a trial on the merits is not enough."

Johnson v. Bd. of Police Comm'rs, 351 F. Supp. 2d 929, 945 (E. D. Mo. 2004). The party that seeks injunctive relief must show that a significant risk of harm exists. Doe, 514 F. Supp. 2d at 1135 (citing Johnson, 351 F. Supp. 2d at 945). The absence of such a showing is sufficient grounds to deny injunctive relief. Id. (citing Gelco Corp. v. Coniston Partners, 811 F.2d 414, 420 (8th Cir. 1987)).

It is axiomatic to say that the "protection [of political speech] lies at the heart of the First Amendment. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring). The United States Supreme Court has recognized that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). In this case, North Dakota's enforcement of the electioneering ban will prevent Emineth from expressing his support for candidates in the overall context of the 2012 election cycle; specifically, on Election Day. Elections are, by nature, time sensitive and finite. While there will be other elections, no future election will be *this* election. Emineth is desirous of voicing his support for the specific candidates running for election on November 6, 2012. If he is forbidden from doing so, no court can offer the equitable relief of going back to November 6, 2012, once that day has passed. Thus, the harm Emineth suffers will arguably be irreparable.

The Eighth Circuit Court of Appeals said that, "[i]f [plaintiff] can establish a sufficient likelihood of success on the merits of [his] First Amendment claim, [he] will also have established irreparable harm." See Phelps-Roper v. Nixon, 545 F.3d 685, 690 (8th Cir. 2008), overruled on other grounds by Phelps-Roper v. City of Manchester, Ma., --- F.3d ----, 2012 WL 4868215 (8th Cir.). The Court finds this *Dataphase* factor weighs in favor of granting a preliminary injunction.

B. BALANCE OF HARM.

In the context of injunctions, the Eighth Circuit has noted that "[t]he balance of equities. . . favors the constitutionally-protected freedom of expression." Phelps-Roper v. Nixon, 545 F.3d at 690. This case hinges upon the First Amendment freedom of speech on a crucial day – Election Day 2012. At issue is a unique and broad provision of state election law enacted in 1981, which prohibits electioneering on an election day. The State indicates that a similar prohibition has existed in North Dakota statutory law since at least 1911. See 1911 N.D. Sess. Laws, ch. 129 § 16. The purpose of the original law was to "Secure the Purity of Elections. . .". Id.[1] A cursory review of the statute raises serious questions as to its constitutionality and its justification in modern day society. Thousands of voters in Burleigh County, and throughout the State of North Dakota, have already cast their ballot at the polls – all while being constantly bombarded by political ads designed to "induce or persuade" them to vote a certain way in this election. While the public interest in upholding Emineth's free speech rights is great, no party has an interest in the enforcement of an unconstitutional law. The Court finds this *Dataphase* factor weighs in favor of the issuance of a preliminary injunction.

C. PUBLIC INTEREST.

The First Amendment is the foundation to our political process. Thus, vindication of the rights it guarantees would rarely serve the public more than on an election day. In the context of an

[1] Few would agree that political campaigns in modern times are pure. Most people today would acknowledge that with the advent of Super PACs, elections have become events where billions of dollars are spent bludgeoning political candidates, parties, and the federal government. Common in elections across America today are divisive, negative, and vitriolic political campaigns which, in the eyes of most voters, has reached a new level of dysfunction. The long-term ramifications of this relentless negativity is yet to be seen.

injunction, "the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights." Phelps-Roper, 545 F.3d at 690; see Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1, 690 F.3d 996, 1004 (8th Cir. 2012) (noting that a likely First Amendment violation favors the issuance of an injunction). It is undisputed that the "public interest favors protecting core First Amendment freedoms." See Iowa Right to Life Comm., Inc. v. Williams, 187 F. 3d 963, 970 (8th Cir. 1999). Thus, the Court finds this *Dataphase* factor also weighs in favor of the issuance of a preliminary injunction.

D. PROBABILITY OF SUCCESS ON THE MERITS.

The electioneering ban in North Dakota was enacted in 1981, and expressly prohibits "[a]ny person asking, soliciting, or in any manner trying to induce or persuade, any voter on an election day to vote or refrain from voting for any candidate or the candidates or ticket of any political party or organization, or any measure submitted to the people." It is clear that, on its face, the statue imposes a prior restraint on protected speech. As a prior restraint, the law is subject to "strict scrutiny" – a test it appears to fail because it is not narrowly tailored to a compelling government interest.

A prior restraint is generally any governmental action that would prevent a communication from reaching the public. Specifically, it is a statutory, administrative, judicial, or other prohibition that forecloses speech before it takes place. For decades, the United States Supreme Court has condemned prior restraints. Indeed, "[a]ny system of prior restraints of expression comes to this

Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (internal citations omitted).

The North Dakota electioneering ban outlaws speech about candidates, parties, and ballot measures on any election day. Rather than punishing speech that interferes with the fair and orderly administration of elections where such speech takes place, the law was issued in advance of the time the forbidden communications are to occur. The electioneering ban broadly prohibits speech both on its face and by inducing excessive caution on the part of the speaker.

The Supreme Court has invalidated statutes as prior restraints when they impose upon speakers "an uphill burden to prove their conduct lawful." Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600, 620 (2003). The Court certainly recognizes that some speech can be harmful, such as voter harassment and intimidation. However, North Dakota's prior restraint on *all* speech lacks the required "nexus" to these undesired outcomes.

It is clear and undisputed that prior restraints on speech are subject to strict judicial scrutiny. The United States Supreme Court has held that a prior restraint is justified "only where the evil that would result from the [speech] is both great and certain and cannot be mitigated by less intrusive measures." CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994). In addition to being a prior restraint, the North Dakota electioneering law is a content-based restriction on speech, since it singles out election-related expression for prohibition. This is particularly troublesome because "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." Buckley v. Valeo, 424 U.S. 1, 14 (1976) (holding that spending money to speak about elections is constitutionally-protected speech). The Supreme Court has recognized that "government entities are strictly limited in their ability to regulate private speech in such 'traditional

public fora.'" Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469 (2009) (internal citation omitted). "Reasonable time, place, and manner restrictions are allowed," but content-based restrictions must satisfy strict scrutiny; i.e., they must be "narrowly tailored to serve a compelling government interest." Id.

In order to satisfy strict scrutiny, laws "must be narrowly tailored to serve a compelling government interest." Id. The State of North Dakota has failed to articulate a compelling government interest that the challenged law furthers. One can hardly conceive of a statute less narrowly tailored than a blanket prohibition on *all* election-related speech. Such a broad restriction on constitutional rights has rarely, if ever, been found to be constitutional, regardless of the context. See Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 577 (1987) (finding regulation prohibiting "all 'First Amendment activities'" at an airport *substantially* overbroad); Edenfield v. Fane, 507 U.S. 761, 777 (1993) (holding that "[e]ven under the First Amendment's somewhat more forgiving standards for restrictions on commercial speech, a State may not curb protected expression without advancing a substantial governmental interest").

The only ascertainable state interest in enacting and enforcing North Dakota's electioneering law was articulated in a case which construed it more than twenty years ago. In District One Republican Committee v. District One Democrat Committee, 466 N.W.2d 820, 832 (N.D. 1991), the plaintiffs argued that the court should read and expand Section 16.1-10-06 to prohibit distribution of election-related flyers the night before the election in order to "prevent last minute election tactics . . . and promote an election system where each candidate is fairly and equitably allowed time to respond to issues and statements raised by the opposition." Id. While the plaintiffs

did not persuade the court to extend the law's speech prohibition to apply the evening before an election, their argument provides some insight into the law's legislative intent and purpose.

The State of North Dakota may have wanted to ensure that if someone made a false accusation about a candidate (or a ballot measure or a party), that candidate would have adequate time to refute the allegation before voters cast their ballots. If this was the intention, the Legislature presumably concluded that allowing virtually any election-related speech on an election day would foreclose the opportunity for a timely response, undermining the election's integrity if such last-minute allegations proved influential but false.

The United States Supreme Court expressly rejected this "confusive tactics" rationale in Mills v. Alabama, 384 U.S. 214, 220 (1966), noting that

> "[t]his argument, even if it were relevant to the constitutionality of the law, has a fatal flaw. The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law . . . then goes on to make it a crime to answer those 'last-minute' charges on election day, the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate 'from confusive last-minute charges and countercharges.'"

Id. The Supreme Court went on to conclude that "no test of reasonableness" could save that "law from invalidation as a violation of the First Amendment." Id. North Dakota's electioneering law suffers from this same fatal flaw.

The United States Supreme Court has recognized one state interest as sufficiently compelling to justify prohibitions on speech: preserving the right of individuals to vote freely, effectively, and in secret by "regulat[ing] conduct in and around the polls in order to maintain peace, order and decorum there." Burson v. Freeman, 504 U.S. 191, 193 (1992). However, the State of North Dakota does not assert in this case that the electioneering ban furthers such an interest.

In the context of restricting speech, the United States Supreme Court found the requisite narrow tailoring in Burson v. Freeman, based on the state's compelling interest in "regulat[ing] conduct in and around the polls in order to maintain peace, order and decorum there." Id. The Supreme Court in *Burson* held that Tennessee's statutory "campaign free zones," which prohibited vote solicitation within 100 feet of the polls, constituted "the rare case in which we have held that a law survives strict scrutiny." Id. at 211. Consistent with this ruling, several states have campaign or electioneering-free zones within a limited geographical radius of polling places. The Supreme Court in *Burson* was careful to note that "[a]t some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden." Id. at 210-11.

The Court finds that North Dakota's electioneering law is overly broad and is not limited to conduct in and around the polls. Instead, the law extends to "[a]ny person asking, soliciting, or in any manner trying to induce or persuade, any voter on an election day to vote or refrain from voting for any candidate or the candidates or ticket of any political party or organization, or any measure submitted to the people." N.D.C.C. § 16.1-10-06. Many states regulate conduct at or near the polls, and this appears sufficient to preserve the right of individuals to vote freely, effectively, and in secret. However, North Dakota's virtually unlimited ban on "electioneering" and election-related speech goes far beyond these less intrusive measures, and is far from being narrowly tailored in order to withstand a constitutional challenge.

The controlling case in this dispute is Mills v. Alabama, 384 U.S. 214 (1966). In *Mills*, the United States Supreme Court invalidated a state law which made it illegal for a newspaper editor "to do no more than urge people to vote one way or another in a publicly held election" on Election

Day. Id. at 220. In *Mills*, the Supreme Court addressed the constitutionality of an Alabama law which outlawed the publication of election-related newspaper editorials on Election Day. In striking down the statute, the Supreme Court stated the following:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.
>
> * * *
>
> Admitting that the state law restricted a newspaper editor's freedom to publish editorials on election day, the Alabama Supreme Court nevertheless sustained the constitutionality of the law on the ground that the restrictions on the press were only 'reasonable restrictions' or at least 'within the field of reasonableness.' The court reached this conclusion because it thought the law imposed only a minor limitation on the press-restricting it only on election days-and because the court thought the law served a good purpose. It said:
>
> > "It is a salutary legislative enactment that protects the public from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day; when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over." 278 Ala. 188, 195-196, 176 So.2d 884, 890.
>
> This argument, even if it were relevant to the constitutionality of the law, has a fatal flaw. The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law held valid by the Alabama Supreme Court then goes on to make it a crime to answer those 'last-minute' charges on election day, the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate 'from confusive last-minute charges and countercharges.' We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election.

Id. at 218-20.

The State of North Dakota's electioneering ban is a far more sweeping prohibition on speech than the law invalidated by the United States Supreme Court in *Mills* back in 1966. While Alabama limited just one form of speech (newspaper editorials on election day), North Dakota prohibits all conceivable means of attempted or actual persuasion or speech, except for billboards and certain bumper stickers. Since Alabama's prohibition on editorials did not survive constitutional scrutiny, North Dakota's far broader ban on electioneering activities cannot survive the more intense "strict scrutiny" required in this challenge. The electioneering ban flies in the face of general constitutional principles the Supreme Court has articulated in the context of both the free speech and free press clauses for decades. There is simply no reading of the statute that is consistent with the United States Constitution. The Court finds this *Dataphase* factor weighs strongly in favor of the issuance of a preliminary injunction.

III. CONCLUSION

After a careful review of the entire record, and an analysis of the *Dataphase* factors, the Court finds the plaintiff has met his burden under Rule 65 for the issuance of a preliminary injunction. The North Dakota electioneering ban enacted in 1981 is an unreasonable restraint on constitutionally-protected speech. It is clearly an invalid law based on United States Supreme Court precedent (*Mills v. Alabama*) from 1966. There is no valid justification for the law in modern day society, nor any compelling state interest offered to support its continued existence. As a practical matter, tens of thousands of individuals in Burleigh County, and throughout the State of North Dakota, have already cast their vote in this election by absentee ballot or early voting – all while being bombarded nearly every waking moment by vitriolic political ads designed to "induce or

persuade" them to vote or refrain from voting for a particular candidate or political party. Decades from now we will likely learn from the "experts" that such electioneering overkill has been hazardous to the health and well-being of us all. The broad electioneering ban in North Dakota – which is designed to prohibit any "electioneering" activity on the day of an election – cannot withstand a constitutional challenge. The demise of this archaic law enacted in 1911, to "secure the purity of elections," has long been recognized as inevitable.

The Court **GRANTS** the plaintiff's motion for a preliminary injunction (Docket No. 12) and **ORDERS**:

(1) That the defendants or anyone acting on their behalf, shall be restrained and enjoined during the pendency of this action from prosecuting any person for a violation of Section 16.1-10-06 of the North Dakota Century Code.

(2) No bond shall be required to be posted by the plaintiff before the preliminary injunction is effective. See Rule 65(c).

(3) The plaintiff shall arrange for the immediate service of this order on the defendants.

(4) The parties shall inform the Court within the next thirty (30) days whether there is a need to schedule a trial on the merits.

IT IS SO ORDERED.

Dated this 31st day of October, 2012.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court

Attachment #3

ALVIN A. JAEGER
SECRETARY OF STATE
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SECRETARY OF STATE

STATE OF NORTH DAKOTA
600 EAST BOULEVARD AVENUE DEPT 108
BISMARCK ND 58505-0500

February 1, 2013

TO: Sen. Dever, Chairman, and Members of the Senate Government and Veterans' Affairs Committee

FR: Jim Silrum, Deputy Secretary of State, on behalf of Al Jaeger, Secretary of State

RE: SB 2213 – Restricted Area around Polling Places for Certain Activities

On October 31, 2012, Daniel L Hovland, District Judge, United States District Court issued an order in which he ruled that the North Dakota electioneering prohibition law, N.D.C.C. § 16.1-10-06, was unconstitutional. Although it was declared unconstitutional, courts have ruled that it is permissible for states to adopt laws prohibiting electioneering and certain other activities within a specified distance from the entrance to a polling location open for voting.

The intent of this bill is to establish such a boundary. The chosen setback is 100 feet. According to a survey conducted by the National Association of Secretaries of State, nineteen states use this setback.

Section 1, page 1, lines 9 and 12: The proposed changes make it clear that the service of civil process is not allowed within 100 feet of any polling location "open for voting" including early voting locations.

Section 2, page 1, lines 17 through 20: This change establishes the distance of 100 feet from the entrance to a polling location in which electioneering is prohibited including early voting locations.

Section 2, page 1, line 21: Although the infraction penalty is removed from this section, it becomes a class A misdemeanor because of the penalty in N.D.C.C. § 16.1-10-08, which pertains to the violation of any provisions of Chapter 16.1-10.

Section 2, page 2, lines 2 through 5: This addition would allow a vehicle with a political message to remain within the prohibited zone only during the period necessary for the vehicle's owner or operator to complete his or her act of voting.

Section 3, page 2, lines 14 and 15: This change ensures that the electioneering is prohibited with the setback on any day the polling location is open for voting.

We request your favorable consideration and a do pass recommendation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Gary Emineth, Plaintiff, vs. Alvin Jaeger, Secretary of State of North Dakota, in his official capacity; Wayne Stenehjem, Attorney General of North Dakota, in his official capacity; Richard J. Riha, Burleigh County State's Attorney, in his official capacity, Defendants.	)	**ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION** Case No. 1:12-cv-139

Before the Court is a "Motion for Preliminary Injunction" filed by the Plaintiff on October 25, 2012. See Docket No. 12. The defendants filed responsive briefs on October 29, 2012. See Docket Nos. 13-14. The parties have agreed there is no need for a hearing on the motion and the matter may be decided on the briefs. For the reasons set forth below, the motion is **GRANTED**.

I. BACKGROUND

The plaintiff, Gary Emineth, is a resident of Lincoln, North Dakota. Emineth challenges the constitutionality of Section 16.1-10-06 of the North Dakota Century Code, which provides as follows:

> **16.1-10-06. Electioneering on Election Day - Penalty.**
> Any person asking, soliciting, or in any manner trying to induce or persuade, any voter on an election day to vote or refrain from voting for any candidate or the candidates or ticket of any political party or organization, or any measure submitted to the people, is guilty of an infraction. The display upon motor vehicles of adhesive signs which are not readily removable and which promote the candidacy of any individual, any political party, or a vote upon any measure, and political

> advertisements promoting the candidacy of any individual, political party, or a vote upon any measure which are displayed on fixed permanent billboards, may not, however, be deemed a violation of this section.

Emineth seeks to exercise his First Amendment right to engage in political activity on November 6, 2012 – Election Day. He contends the North Dakota statute is an unconstitutional abridgment of his First Amendment right to free speech as incorporated against the states by the Fourteenth Amendment. Emineth is currently engaged in constitutionally-protected speech through a display of election yard signs on his private property, and he does not wish to take those signs down on November 6, 2012, as required by North Dakota law. Emineth states that he wishes to speak in support of candidates on Election Day by distributing flyers in public places, which state law prohibits. Emineth states that he frequently discusses the upcoming election with friends, family members, associates, and neighbors, and seeks to continue to do so on Election Day, but state law prohibits such actions. Emineth contends the plain language of Section 16.1-10-06 criminalizes *all speech* aimed at persuading a voter to cast (or not cast) his or her ballot in any particular way on Election Day. He argues that outlawing this conduct before it even takes place imposes a prior restraint on constitutionally-protected speech. Under North Dakota law, if a private individual advocates for or against a candidate, a ballot measure, or any party on an election day – whether to a family member, neighbor, friend, associate, or any other voter – that individual is subject to criminal prosecution. There are few exceptions to criminal prosecution, other than the limited exception for billboards and bumper stickers with particular adhesion qualities. See N.D.C.C. § 16.1-10-06.

II. LEGAL DISCUSSION

In determining whether a preliminary injunction should be granted, Rule 65(b) of the Federal Rules of Civil Procedure directs the court to assess whether immediate and irreparable injury, loss, or damage will result to the applicant. The court is required to consider the factors set forth in Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981). Whether a preliminary injunction or temporary restraining order should be granted involves consideration of "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." Id.

It is well-established that the burden of establishing the necessity of a temporary restraining order or a preliminary injunction is on the movant. Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994); Modern Computer Sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734, 737 (8th Cir. 1989). "'No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction.'" Baker Elec. Coop., Inc., 28 F.3d at 1472 (quoting Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc., 815 F.2d 500, 503 (8th Cir. 1987)).

A. IRREPARABLE HARM

The plaintiff must show there is a threat of irreparable harm if injunctive relief is not granted, and that such harm is not compensable by money damages. Doe v. LaDue, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007) (citing Northland Ins. Cos. v. Blaylock, 115 F. Supp. 2d 1108, 1116 (D. Minn. 2000)). "The 'mere possibility' that harm may occur before a trial on the merits is not enough."

Johnson v. Bd. of Police Comm'rs, 351 F. Supp. 2d 929, 945 (E. D. Mo. 2004). The party that seeks injunctive relief must show that a significant risk of harm exists. Doe, 514 F. Supp. 2d at 1135 (citing Johnson, 351 F. Supp. 2d at 945). The absence of such a showing is sufficient grounds to deny injunctive relief. Id. (citing Gelco Corp. v. Coniston Partners, 811 F.2d 414, 420 (8th Cir. 1987)).

It is axiomatic to say that the "protection [of political speech] lies at the heart of the First Amendment. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring). The United States Supreme Court has recognized that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). In this case, North Dakota's enforcement of the electioneering ban will prevent Emineth from expressing his support for candidates in the overall context of the 2012 election cycle; specifically, on Election Day. Elections are, by nature, time sensitive and finite. While there will be other elections, no future election will be *this* election. Emineth is desirous of voicing his support for the specific candidates running for election on November 6, 2012. If he is forbidden from doing so, no court can offer the equitable relief of going back to November 6, 2012, once that day has passed. Thus, the harm Emineth suffers will arguably be irreparable.

The Eighth Circuit Court of Appeals said that, "[i]f [plaintiff] can establish a sufficient likelihood of success on the merits of [his] First Amendment claim, [he] will also have established irreparable harm." See Phelps-Roper v. Nixon, 545 F.3d 685, 690 (8th Cir. 2008), overruled on other grounds by Phelps-Roper v. City of Manchester, Ma., --- F.3d ----, 2012 WL 4868215 (8th Cir.). The Court finds this *Dataphase* factor weighs in favor of granting a preliminary injunction.

B. BALANCE OF HARM.

In the context of injunctions, the Eighth Circuit has noted that "[t]he balance of equities. . . favors the constitutionally-protected freedom of expression." Phelps-Roper v. Nixon, 545 F.3d at 690. This case hinges upon the First Amendment freedom of speech on a crucial day – Election Day 2012. At issue is a unique and broad provision of state election law enacted in 1981, which prohibits electioneering on an election day. The State indicates that a similar prohibition has existed in North Dakota statutory law since at least 1911. See 1911 N.D. Sess. Laws, ch. 129 § 16. The purpose of the original law was to "Secure the Purity of Elections. . .". Id.[1] A cursory review of the statute raises serious questions as to its constitutionality and its justification in modern day society. Thousands of voters in Burleigh County, and throughout the State of North Dakota, have already cast their ballot at the polls – all while being constantly bombarded by political ads designed to "induce or persuade" them to vote a certain way in this election. While the public interest in upholding Emineth's free speech rights is great, no party has an interest in the enforcement of an unconstitutional law. The Court finds this *Dataphase* factor weighs in favor of the issuance of a preliminary injunction.

C. PUBLIC INTEREST.

The First Amendment is the foundation to our political process. Thus, vindication of the rights it guarantees would rarely serve the public more than on an election day. In the context of an

[1] Few would agree that political campaigns in modern times are pure. Most people today would acknowledge that with the advent of Super PACs, elections have become events where billions of dollars are spent bludgeoning political candidates, parties, and the federal government. Common in elections across America today are divisive, negative, and vitriolic political campaigns which, in the eyes of most voters, has reached a new level of dysfunction. The long-term ramifications of this relentless negativity is yet to be seen.

injunction, "the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights." Phelps-Roper, 545 F.3d at 690; see Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1, 690 F.3d 996, 1004 (8th Cir. 2012) (noting that a likely First Amendment violation favors the issuance of an injunction). It is undisputed that the "public interest favors protecting core First Amendment freedoms." See Iowa Right to Life Comm., Inc. v. Williams, 187 F. 3d 963, 970 (8th Cir. 1999). Thus, the Court finds this *Dataphase* factor also weighs in favor of the issuance of a preliminary injunction.

D. PROBABILITY OF SUCCESS ON THE MERITS.

The electioneering ban in North Dakota was enacted in 1981, and expressly prohibits "[a]ny person asking, soliciting, or in any manner trying to induce or persuade, any voter on an election day to vote or refrain from voting for any candidate or the candidates or ticket of any political party or organization, or any measure submitted to the people." It is clear that, on its face, the statue imposes a prior restraint on protected speech. As a prior restraint, the law is subject to "strict scrutiny" – a test it appears to fail because it is not narrowly tailored to a compelling government interest.

A prior restraint is generally any governmental action that would prevent a communication from reaching the public. Specifically, it is a statutory, administrative, judicial, or other prohibition that forecloses speech before it takes place. For decades, the United States Supreme Court has condemned prior restraints. Indeed, "[a]ny system of prior restraints of expression comes to this

Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (internal citations omitted).

The North Dakota electioneering ban outlaws speech about candidates, parties, and ballot measures on any election day. Rather than punishing speech that interferes with the fair and orderly administration of elections where such speech takes place, the law was issued in advance of the time the forbidden communications are to occur. The electioneering ban broadly prohibits speech both on its face and by inducing excessive caution on the part of the speaker.

The Supreme Court has invalidated statutes as prior restraints when they impose upon speakers "an uphill burden to prove their conduct lawful." Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600, 620 (2003). The Court certainly recognizes that some speech can be harmful, such as voter harassment and intimidation. However, North Dakota's prior restraint on *all* speech lacks the required "nexus" to these undesired outcomes.

It is clear and undisputed that prior restraints on speech are subject to strict judicial scrutiny. The United States Supreme Court has held that a prior restraint is justified "only where the evil that would result from the [speech] is both great and certain and cannot be mitigated by less intrusive measures." CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994). In addition to being a prior restraint, the North Dakota electioneering law is a content-based restriction on speech, since it singles out election-related expression for prohibition. This is particularly troublesome because "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." Buckley v. Valeo, 424 U.S. 1, 14 (1976) (holding that spending money to speak about elections is constitutionally-protected speech). The Supreme Court has recognized that "government entities are strictly limited in their ability to regulate private speech in such ' traditional

public fora.'" Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469 (2009) (internal citation omitted). "Reasonable time, place, and manner restrictions are allowed," but content-based restrictions must satisfy strict scrutiny; i.e., they must be "narrowly tailored to serve a compelling government interest." Id.

In order to satisfy strict scrutiny, laws "must be narrowly tailored to serve a compelling government interest." Id. The State of North Dakota has failed to articulate a compelling government interest that the challenged law furthers. One can hardly conceive of a statute less narrowly tailored than a blanket prohibition on *all* election-related speech. Such a broad restriction on constitutional rights has rarely, if ever, been found to be constitutional, regardless of the context. See Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 577 (1987) (finding regulation prohibiting "all 'First Amendment activities'" at an airport *substantially* overbroad); Edenfield v. Fane, 507 U.S. 761, 777 (1993) (holding that "[e]ven under the First Amendment's somewhat more forgiving standards for restrictions on commercial speech, a State may not curb protected expression without advancing a substantial governmental interest").

The only ascertainable state interest in enacting and enforcing North Dakota's electioneering law was articulated in a case which construed it more than twenty years ago. In District One Republican Committee v. District One Democrat Committee, 466 N.W.2d 820, 832 (N.D. 1991), the plaintiffs argued that the court should read and expand Section 16.1-10-06 to prohibit distribution of election-related flyers the night before the election in order to "prevent last minute election tactics . . . and promote an election system where each candidate is fairly and equitably allowed time to respond to issues and statements raised by the opposition." Id. While the plaintiffs

did not persuade the court to extend the law's speech prohibition to apply the evening before an election, their argument provides some insight into the law's legislative intent and purpose.

The State of North Dakota may have wanted to ensure that if someone made a false accusation about a candidate (or a ballot measure or a party), that candidate would have adequate time to refute the allegation before voters cast their ballots. If this was the intention, the Legislature presumably concluded that allowing virtually any election-related speech on an election day would foreclose the opportunity for a timely response, undermining the election's integrity if such last-minute allegations proved influential but false.

The United States Supreme Court expressly rejected this "confusive tactics" rationale in Mills v. Alabama, 384 U.S. 214, 220 (1966), noting that

> "[t]his argument, even if it were relevant to the constitutionality of the law, has a fatal flaw. The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law . . . then goes on to make it a crime to answer those 'last-minute' charges on election day, the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate 'from confusive last-minute charges and countercharges.'"

Id. The Supreme Court went on to conclude that "no test of reasonableness" could save that "law from invalidation as a violation of the First Amendment." Id. North Dakota's electioneering law suffers from this same fatal flaw.

The United States Supreme Court has recognized one state interest as sufficiently compelling to justify prohibitions on speech: preserving the right of individuals to vote freely, effectively, and in secret by "regulat[ing] conduct in and around the polls in order to maintain peace, order and decorum there." Burson v. Freeman, 504 U.S. 191, 193 (1992). However, the State of North Dakota does not assert in this case that the electioneering ban furthers such an interest.

In the context of restricting speech, the United States Supreme Court found the requisite narrow tailoring in Burson v. Freeman, based on the state's compelling interest in "regulat[ing] conduct in and around the polls in order to maintain peace, order and decorum there." Id. The Supreme Court in *Burson* held that Tennessee's statutory "campaign free zones," which prohibited vote solicitation within 100 feet of the polls, constituted "the rare case in which we have held that a law survives strict scrutiny." Id. at 211. Consistent with this ruling, several states have campaign or electioneering-free zones within a limited geographical radius of polling places. The Supreme Court in *Burson* was careful to note that "[a]t some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden." Id. at 210-11.

The Court finds that North Dakota's electioneering law is overly broad and is not limited to conduct in and around the polls. Instead, the law extends to "[a]ny person asking, soliciting, or in any manner trying to induce or persuade, any voter on an election day to vote or refrain from voting for any candidate or the candidates or ticket of any political party or organization, or any measure submitted to the people." N.D.C.C. § 16.1-10-06. Many states regulate conduct at or near the polls, and this appears sufficient to preserve the right of individuals to vote freely, effectively, and in secret. However, North Dakota's virtually unlimited ban on "electioneering" and election-related speech goes far beyond these less intrusive measures, and is far from being narrowly tailored in order to withstand a constitutional challenge.

The controlling case in this dispute is Mills v. Alabama, 384 U.S. 214 (1966). In *Mills*, the United States Supreme Court invalidated a state law which made it illegal for a newspaper editor "to do no more than urge people to vote one way or another in a publicly held election" on Election

Day. Id. at 220. In *Mills*, the Supreme Court addressed the constitutionality of an Alabama law which outlawed the publication of election-related newspaper editorials on Election Day. In striking down the statute, the Supreme Court stated the following:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.
>
> * * *
>
> Admitting that the state law restricted a newspaper editor's freedom to publish editorials on election day, the Alabama Supreme Court nevertheless sustained the constitutionality of the law on the ground that the restrictions on the press were only 'reasonable restrictions' or at least 'within the field of reasonableness.' The court reached this conclusion because it thought the law imposed only a minor limitation on the press-restricting it only on election days-and because the court thought the law served a good purpose. It said:
>
> > "It is a salutary legislative enactment that protects the public from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day; when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over." 278 Ala. 188, 195-196, 176 So.2d 884, 890.
>
> This argument, even if it were relevant to the constitutionality of the law, has a fatal flaw. The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law held valid by the Alabama Supreme Court then goes on to make it a crime to answer those 'last-minute' charges on election day, the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate 'from confusive last-minute charges and countercharges.' We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election.

Id. at 218-20.

The State of North Dakota's electioneering ban is a far more sweeping prohibition on speech than the law invalidated by the United States Supreme Court in *Mills* back in 1966. While Alabama limited just one form of speech (newspaper editorials on election day), North Dakota prohibits all conceivable means of attempted or actual persuasion or speech, except for billboards and certain bumper stickers. Since Alabama's prohibition on editorials did not survive constitutional scrutiny, North Dakota's far broader ban on electioneering activities cannot survive the more intense "strict scrutiny" required in this challenge. The electioneering ban flies in the face of general constitutional principles the Supreme Court has articulated in the context of both the free speech and free press clauses for decades. There is simply no reading of the statute that is consistent with the United States Constitution. The Court finds this *Dataphase* factor weighs strongly in favor of the issuance of a preliminary injunction.

III. CONCLUSION

After a careful review of the entire record, and an analysis of the *Dataphase* factors, the Court finds the plaintiff has met his burden under Rule 65 for the issuance of a preliminary injunction. The North Dakota electioneering ban enacted in 1981 is an unreasonable restraint on constitutionally-protected speech. It is clearly an invalid law based on United States Supreme Court precedent (*Mills v. Alabama*) from 1966. There is no valid justification for the law in modern day society, nor any compelling state interest offered to support its continued existence. As a practical matter, tens of thousands of individuals in Burleigh County, and throughout the State of North Dakota, have already cast their vote in this election by absentee ballot or early voting – all while being bombarded nearly every waking moment by vitriolic political ads designed to "induce or

persuade" them to vote or refrain from voting for a particular candidate or political party. Decades from now we will likely learn from the "experts" that such electioneering overkill has been hazardous to the health and well-being of us all. The broad electioneering ban in North Dakota – which is designed to prohibit any "electioneering" activity on the day of an election – cannot withstand a constitutional challenge. The demise of this archaic law enacted in 1911, to "secure the purity of elections," has long been recognized as inevitable.

The Court **GRANTS** the plaintiff's motion for a preliminary injunction (Docket No. 12) and **ORDERS**:

(1) That the defendants or anyone acting on their behalf, shall be restrained and enjoined during the pendency of this action from prosecuting any person for a violation of Section 16.1-10-06 of the North Dakota Century Code.

(2) No bond shall be required to be posted by the plaintiff before the preliminary injunction is effective. See Rule 65(c).

(3) The plaintiff shall arrange for the immediate service of this order on the defendants.

(4) The parties shall inform the Court within the next thirty (30) days whether there is a need to schedule a trial on the merits.

IT IS SO ORDERED.

Dated this 31st day of October, 2012.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court

Attachment 2

ALVIN A. JAEGER
SECRETARY OF STATE

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SECRETARY OF STATE

STATE OF NORTH DAKOTA
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March 14, 2013

TO: Rep. Kasper, Chairman, and Members of the House Government and Veterans' Affairs Committee

FR: Jim Silrum, Deputy Secretary of State, on behalf of Al Jaeger, Secretary of State

RE: SB 2213 – Restricted Area around Polling Places for Certain Activities

On October 31, 2012, Daniel L Hovland, District Judge, United States District Court issued an order in which he ruled that the North Dakota electioneering prohibition law, N.D.C.C. § 16.1-10-06, was unconstitutional. Although the prohibition was declared unconstitutional, courts have ruled that it is permissible for states to adopt laws prohibiting electioneering and certain other activities within a specified distance from the entrance to a polling location open for voting.

The intent of this bill is to establish such a boundary. The chosen setback is 100 feet. According to a survey conducted by the National Association of Secretaries of State, nineteen states use this setback.

Section 1, page 1, lines 9 and 12: The proposed changes make it clear that the service of civil process is not allowed within 100 feet of any polling location "open for voting" including early voting locations.

Section 2, page 1, lines 17 through 20: This change establishes the distance of 100 feet from the entrance to a polling location in which electioneering is prohibited including early voting locations.

Section 2, page 1, line 21: Although the infraction penalty is removed from this section, it becomes a class A misdemeanor because of the penalty in N.D.C.C. § 16.1-10-08, which pertains to the violation of any provisions of Chapter 16.1-10.

Section 2, page 2, lines 2 through 5: This addition would allow a vehicle with a political message to remain within the prohibited zone only during the period necessary for the vehicle's owner or operator to complete his or her act of voting.

Section 3, page 2, lines 14 and 15: This change ensures that the sale of goods, advertising for sale, distribution and signature gathering is prohibited with the setback on any day the polling location is open for voting.

We request your favorable consideration and a do pass recommendation.

Attachment 1

13.8228.01003
Title.

Prepared by the Legislative Council staff for
Representative B. Koppelman
March 19, 2013

PROPOSED AMENDMENTS TO SENATE BILL NO. 2213

Page 1, line 17, replace "No" with:

"1. An"

Page 1, line 17, replace "shall" with "may not"

Page 2, line 2, replace "However, vehicles and movable signs" with:

"2. A vehicle or movable sign"

Page 2, line 2, remove "political"

Page 2, line 3, replace "messages" with "a political message"

Page 2, line 3, replace "by this section shall only" with "in subsection 1 may"

Page 2, line 3, after "area" insert "only"

Page 2, after line 5, insert:

"3. Except as provided in subsection 1, a sign placed on private property which displays a political message may not be restricted by a political subdivision, including a home rule city or county, unless the political subdivision demonstrates a burden to the public safety."

Renumber accordingly